

<sup>1</sup> Order (Jul. 10, 2003) at 1.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record compiled to date and the parties' briefs, the Appeals Board (Board) makes the following findings of fact and conclusions of law:

This is the third Board review from a preliminary hearing order entered on this claim. On July 25, 2002, Administrative Law Judge Jon L. Frobish entered an order that claimant had failed to sustain her burden of proof that she sustained a work-related injury arising out of and in the course of her employment with respondent. The claimant appealed that decision to the Board.

The Board determined the issues on appeal were whether claimant gave timely notice and whether she suffered accidental injury arising out of and in the course of her employment. The Board held that claimant gave timely notice of a work-related accident and that claimant sustained a work-related injury to her back. However, the record did not establish whether that injury was temporary or permanent. Furthermore, claimant had failed to prove that her subsequent need for back surgery was due to a back injury that arose out of and in the course of her employment with respondent. As claimant failed to establish a direct connection between her work that ended November 11, 2001, and her surgery in June of 2002, the Order of the ALJ was affirmed.

A second preliminary hearing was held on February 6, 2003, before John D. Clark. Judge Clark made no factual findings but entered an order stating that he had no authority to reverse the decision issued by the Board and denied all benefits. Claimant requested a review and on March 27, 2003, the Board remanded the case back to Judge Clark for a determination on the merits. The Board said:

An ALJ is not limited in the number of preliminary hearings that may be held in a case. It is within the sound discretion and authority of the ALJ to determine the number of preliminary hearings to be held and whether a prior preliminary hearing Order should be modified based on the evidence presented. Furthermore, the ALJ has the jurisdiction and authority to amend, modify and/or clarify a preliminary order as the evidence may dictate or as circumstances may require.

A preliminary hearing is a summary proceeding and a decision based upon the evidence presented at such preliminary hearing, whether rendered by an ALJ or the Board upon appeal from a preliminary hearing, is not binding upon the parties but subject to a full hearing on the claim. Because new evidence may materially alter the basis for a prior preliminary decision, whether made by an ALJ or the Board, such decisions are subject to change.

Consequently, the ALJ had the authority to determine the issues raised at the second preliminary hearing.<sup>2</sup>

At the third preliminary hearing held on July 10, 2003, claimant presented the medical records of two physicians and depositions of co-workers. A letter dated November 19, 2002, from Dr. Eyster, claimant's treating physician, and a December 2002 independent medical examination performed by Dr. Murati, both relate a history as told to them by the claimant. Neither physician expresses his medical opinion that the claimant's need for surgery was more probably than not caused by or directly attributable to an injury at her work.

Furthermore, the testimony of claimant's five co-workers does not support her assertion that her former job with respondent required frequent standing and bending at the waist. The five co-workers testified that they stood from three to five times per day for five to fifteen minutes. None of the five co-workers corroborated the claimant's allegation of prolonged standing and frequent bending at work.

Judge Clark again found claimant failed to prove that her need for back surgery seven (7) months after she last worked for respondent was due to a back injury that arose out of and in the course of her employment with respondent.

The Board agrees that the record still fails to prove that claimant's need for back surgery was due to a back injury that arose out of and in the course of her employment with respondent. Consequently, the Board must deny claimant's request for benefits.

**WHEREFORE**, Administrative Law Judge John D. Clark's preliminary hearing Order dated July 10, 2003 is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September 2003.

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BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant  
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier  
John D. Clark, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

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<sup>2</sup> Order (May 30, 2003) at 3.